Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

VSA, INC., d/b/a VSA CAROLINAS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED

I. Whether the Union's conditional offer to waive initiation fees interfered with employee freedom of choice guaranteed by the National Labor Relations Act.

II. Whether VSA is entitled to an evidentiary hearing on its objections to the Union's conduct during the election.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Petitioner, VSA Incorporated, d/b/a VSA Carolinas, and the Respondent, National Labor Relations Board.

The Petitioner before this Court is VSA Incorporated, d/b/a VSA Carolinas. Petitioner VSA has one subsidiary, Vendors Supply of America Corporation, a Delaware Corporation.

The Respondent before this Court is the National Labor Relations Board.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, VSA Inc., d/b/a VSA Carolinas ("VSA"), respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, for the reasons set forth below.

OPINIONS BELOW

The opinion of the National Labor Relations Board, dated April 20, 1992, adopting the findings of its regional

director and certifying the Union as the exclusive bargaining representative of designated VSA employees is reprinted in the appendix, p. App. 27, *infra*.

The opinion of the National Labor Relations Board, dated December 31, 1992, concluded VSA violated the National Labor Relations Act by refusing to bargain with the Union. It is reported at 309 N.L.R.B. No. 188 and reprinted in the appendix, p. App. 29, *infra*.

The opinion of the United States Court of Appeals for the Fourth Circuit, dated May 12, 1994, affirming the judgment of the National Labor Relations Board, is reported at 24 F.3d 588, and is reprinted in the appendix, p. A 1, *infra*.

The order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, dated June 7, 1994, is reprinted in the appendix, p. App. 37, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1994. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on June 7, 1994. Petitioner's motion for stay of mandate pending certiorari proceedings was granted by the Court of Appeals on July 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158. Unfair labor practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(b) Unfair labor practices by labor organization

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of

a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .

29 U.S.C. § 159. Representatives and elections.

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

* * *

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a

representative as defined in subsection (a) of this section;

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

Petitioner VSA, Incorporated, d/b/a VSA Carolinas ("VSA") is a wholesale food distributor located in Greensboro, North Carolina. On or about October 4, 1991, the Chauffeurs, Teamsters and Helpers Union, Local No. 391 ("Union"), filed a petition with the Respondent, National Labor Relations Board ("Board"), requesting representation of all drivers employed in the transportation division of VSA. A November 22, 1991, election yielded 11 ballots in favor of and 8 ballots opposed to Union representation.

Because the election was unlawfully tainted by, among other things, the Union's conditional waiver of initiation fees, VSA filed timely objections with the Board's regional director. During the early stages of the campaign, the Union made an unconditional offer to waive its standard initiation fee. Later, recognizing its dwindling support, the Union conditioned its waiver on a favorable outcome in *this* election. The Union further

explained that if its drive was unsuccessful, and employees sought representation at a later date, the initiation fee would be imposed.

After conducting a perfunctory administrative review of VSA's objections, the regional director issued a report on January 10, 1992, concluding that none warranted setting aside the election and recommending that VSA's objections be overruled. The regional director totally dismissed the affidavits of three VSA employees who corroborated the Company's objections. Consequently, on February 3, 1992, VSA filed timely exceptions to the regional director's report.

On April 20, 1992, the Board issued its Decision and Certification of Representative formally adopting the regional director's findings and certifying the Union as the exclusive bargaining representative of the employees.

An employer desiring judicial review of a representation election must refuse to bargain with the Union to obtain such a review. *See American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940). VSA did precisely that. In response, the Union filed an unfair labor practice charge with the Board on September 10, 1992, which prompted the issuance of a complaint and notice of hearing alleging VSA had violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("Act") by refusing to bargain. 29 U.S.C. §§ 158(a)(1) and (5). VSA filed an answer in response.

On December 31, 1992, the Board issued its Decision and Order concluding, among other things, that VSA violated the Act through its refusal to bargain with the Union. The Decision and Order required VSA to cease

and desist from interfering with, restraining, or coercing employees in the exercise of their statutory rights, and further required VSA to bargain with the Union.

The general counsel of the Board filed an Application for Enforcement with the United States Court of Appeals for the Fourth Circuit on May 25, 1993. On May 12, 1994, a three-judge panel of the Court of Appeals granted the Board's Application for Enforcement. One judge dissented, finding the Union's conditional waiver of initiation fees to be an unlawful inducement to vote in favor of the Union.

A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on June 7, 1994, and VSA's motion for stay of mandate pending certiorari proceedings was granted by the Court of Appeals on July 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

ARGUMENT

I. The Union's Conditional Preelection Offer To Waive Initiation Fees Interfered With The Employees' Right Of Free Choice And Unduly Influenced The Employees' Discretion.

The Court of Appeals and the Board erroneously determined that the Union's offer to waive initiation fees was a legitimate campaign tactic sanctioned by the Act. As the discussion below demonstrates, the Union's waiver violates the Act's prohibition on coercive actions

that interfere with employees' freedom of choice, circumvents the policy mandate implicit in the Court's holding in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

A. The Union's conditional waiver of initiation fees runs afoul of the National Labor Relations Act's proscription of coercive actions which interfere with employees' freedom of choice.

Section 7 of the National Labor Relations Act (the "Act") guarantees "employees . . . the right not only to 'form, join, or assist' unions but also the right 'to refrain from any or all of such activities.' " *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). These fundamental rights are enforced via sections 8(a)(1) and 8(b)(1), which provide that it is an unfair labor practice for employers and unions to restrain or coerce employees in the exercise of their section 7 rights.

In the election setting, the Board is charged with the duty of insuring that employees' section 7 rights are protected and that a free and fair election is held. In the instant case it is clear that the Board and the Court of Appeals neglected this responsibility. The Union's pre-election offer to waive initiation fees tainted the "laboratory conditions" necessary for untrammelled employee choice and made a free and fair election impossible. *See General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

During the early stages of the campaign, Union representatives quite properly offered to waive initiation fees for all eligible voters. VSA does not challenge this initial waiver.

Later, when the employees began to reconsider the desirability of representation, the Union unlawfully acted on this reversal of employee sentiment by conditioning its waiver on its success in the fast approaching election.[1] More specifically, at several preelection meetings very near the actual election date, Union officials told VSA employees that the Union would waive its approximately $100 initiation fee if, *and only if*, the Union won the election. Driving the point home, these same officials explained that if the Union lost the election, and the employees initiated a subsequent organizing drive, the waiver of initiation fees would no longer be available.

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[1] The majority opinion below rejected VSA's challenge under the erroneous theory that *all* waivers of initiation fees are necessarily contingent on the Union's ultimate success at the ballot box. In other words, according to the majority's analysis, no waiver would become available to eligible voters unless and until the Union actually wins the election. Therefore, under the majority's reasoning, the Union's conditional waiver merely acknowledges a practical reality.

This reasoning fails for two reasons. First, in this day and age of creative union tactics designed to bolster declining membership, many individuals are offered the opportunity to join the dues-paying ranks in exchange for membership perks which have no connection to the collective bargaining process. In other words, you do not need to win an election to become a union member. The Union's conditional waiver made it clear that the initiation fees would be imposed unless the employees obtained an immediate election victory for the Union.

Second, the rationale underlying this Court's *Savair* decision is clearly trampled upon by the Union's actions in this case. *Savair* stands for the notion that waivers of initiation fees should not be used to "buy" union support. An unconditional waiver made expressly conditional in response to declining union support is a blatant attempt to do exactly that.

Unions are allowed to waive initiation fees in order to remove a monetary barrier which might otherwise inhibit employee interest in representation. This leeway to offer a monetary incentive during the preelection period was never intended to be used as an offensive weapon. In this case, the conditional waiver was used as an outright threat.

At first, the waiver was unconditional and, therefore, quite legal under *Savair*. Later, facing the prospect of losing the election, the Union reissued the waiver in conditional and dramatically different terms. The revised waiver essentially communicated this message: if you win the election for us, you don't have to pay initiation fees; if you defeat us, you will pay for it later if and when you change your mind. This message is nothing more than a thinly veiled effort to purchase employee votes and threaten employees with negative consequences for voting against representation.[2] This type of tactic has the coercive effect of interfering with employees' freedom of choice in any representation election.[3]

As this Court noted in *Savair, supra*, "The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union

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[2] Even the Fourth Circuit conceded that the fee waiver was "directly related to a Union victory." *NLRB v. VSA, Inc.*, 24 F.3d 588, 593 (4th Cir. 1994), App. 10, *infra*.

[3] Consider whether VSA could have legally made a similar conditional offer. Had VSA conditioned a $100 employee benefit on the Union's defeat, its actions would clearly have been objectionable. *See, e.g., Crestwood Manor*, 234 N.L.R.B. 1097 (1978); *Harvard Coated Prods. Co.*, 156 N.L.R.B. 162 (1965). *See also, NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

and against a nonunion shop or for a nonunion shop and against a union." *Id.* at 280. If the Court of Appeals' and Board's policy in the present case is allowed to stand, countless employees can be subjected to coercive union tactics which amount to blatant attempts to purchase votes. For these reasons, VSA respectfully requests the Court to grant its petition for writ of certiorari.

B. The Union's offer to waive initiation fees violates both the letter and policy of *Savair*.

In analyzing the Union's offer in the present case, both the Fourth Circuit and the Board failed to accurately apply the principles set forth and policies underlying this Court's decision in *NLRB v. Savair Mfg. Co., supra.*

In *Savair*, this Court held that a preelection waiver of initiation fees conditioned upon a showing of support for the union interferes with the right of employees to refrain from union activities – a right guaranteed by section 7 of the Act. Further, the *Savair* Court held that such a waiver did not comport with the principle of "fair and free choice of bargaining representatives by employees" that is inherent in the principles reflected in section 9(c)(1)(A) of the Act. *See NLRB v. S & S Prod. Eng'g Serv., Inc.*, 513 F.2d 1311 (6th Cir. 1975). The conduct proscribed by *Savair* mirrors the tactics employed by the Union in the present case.

As stated above, Union officials promised VSA employees that the Union would waive its $100 initiation fee if the Union won the election, but that "the deal was off" for any future elections. Clearly, such statements violate *Savair*'s prohibition on allowing a Union "to buy

endorsements . . . during its election campaign." *Savair, supra* at 277. This is especially true when, as in this case, the Union has first made an unconditional waiver, and then conditions this benefit on election success when faced with dwindling support.

In finding the Union's waiver to be a valid campaign tool, the Fourth Circuit and the Board also overlooked the policies underlying this Court's holding in *Savair*. The *Savair* Court focused on the coercive nature of the union's preelection offer to waive initiation fees and the Act's ban on such actions by employers and unions alike. Here, the Union's offer accomplished precisely what *Savair* forbids by forcing employees to choose between the certainty of no initiation fee and the no less certain risk that they would be forced to pay such a fee if the Union lost the November 1991 election.

Unconditional waivers are admittedly legitimate. Waivers tied to union support or success, especially when used as a threat to reverse declining preelection support, cross the line of permissible conduct.

The Court of Appeals and the Board also ignored the Board's own interpretation of *Savair* and its progeny. For example, in *Deming Div.*, 225 N.L.R.B. 657 (1976), the union offered a waiver that stated "there will be no initiation fees for anyone joining now *during this campaign*." *Id.* at 659 (emphasis added).

Applying *Savair*, the Board held this waiver to be objectionable, stating that "a waiver is permissible only where it is unconnected with support for the union before the election," and "unrelated to a vote in the election . . . . " *Id.* Consequently, *Deming* correctly interpreted *Savair* to mean that a

waiver of fees is impermissible not only when it is connected to support for the union before the election but also when it is ***related to a vote*** *in the election.*[4]

That is precisely what happened in the present case. The Union made its fee waiver contingent upon a Union victory in November of 1991. Reasonable employees may have read the Union's promise as: vote for the Union, pay no initiation fees; vote against the Union, pay initiation fees if you want union membership afterwards.

As this Court aptly noted in *Savair*, "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." *Savair, supra* at 278. The Board's policy in this case, affirmed by the Court of Appeals, tramples upon this basic right of fairness. As a result, VSA respectfully requests the Court to grant its petition for writ of certiorari to review the decision of the Fourth Circuit and reverse its flawed findings.[5]

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[4] Interestingly enough, the United States Court of Appeals for the Sixth Circuit held the same in the underlying appeal in *Savair*. There, the appeals court concluded that a waiver of initiation fees contingent upon the outcome of an election is coercive. *NLRB v. Savair Mfg. Co.*, 470 F.2d 305 (6th Cir. 1972), *aff'd*, 414 U.S. 270 (1973).

[5] VSA further contends that the Union's offer to waive initiation fees was so ambiguous and confusing that the election must be set aside.

Well-established court and Board precedent mandate that a representation election must be set aside where a fee waiver is communicated to employees in a confusing fashion. *NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978). *Accord,*

Playhouse Square Found. v. NLRB, 942 F.2d 369 (6th Cir. 1991). The Board and courts have consistently held that **any** such ambiguity must be construed against the Union. *See NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886 (2d Cir. 1983); *Inland Shoe Mfg. Co., Inc.*, 211 N.L.R.B. 724 (1974).

Unions that choose to employ the risky campaign tactic of waiving initiation fees must, at minimum, avoid any message that the waiver is conditioned on union support. It is the union's duty to clarify any such ambiguities "or suffer whatever consequences might attach to employees' possible interpretations" of the waiver offer. *Coleman Co.*, 212 N.L.R.B. 927, 928 (1974) (quoting *Inland Shoe Mfg. Co.*, 211 N.L.R.B. 724, 725 (1974)).

In *Cataract, Inc.*, 274 N.L.R.B. 741 (1985), the union made a statement virtually identical to that at issue in the instant case. There, the union promised that it would waive its $50.00 initiation fee "for organizational purposes for this site" and for "this one time organizational drive." *Id.* In finding the Union's offer to be objectionable, the Board noted that it has repeatedly

> found a union's waiver of initiation fees for such periods of time as "organizational drives" to be ambiguous and subject to the interpretation by employees as applying only to the period before the election. It is also well settled that any ambiguity must be resolved against the party who used the ambiguous term.

Id. (footnotes omitted).

The same result is called for in the present case. Here, VSA submitted sworn affidavits from employees attesting that the Union business agent made the following comments:

1. During a preelection Union meeting, the Union business agent announced that the Union would waive initiation fees only if it was elected as the employees' representative on November 22, 1991, and further stated that the initiation fees would not be waived if the Union was defeated in the election and the employees later attempted to gain Union representation in any future election.
2. During a Union meeting in late October or early November, 1991, the Union business agent announced that there would be no initiation fee at this time, but if the Union was not

II. The Fourth Circuit And The Board Erred In Denying VSA An Evidentiary Hearing On Its Objections To The Election.

Due process demands that where there is a substantial and material issue of fact relating to the validity of a representation election, an evidentiary hearing must be accorded the objecting party. *See Colquest Energy, Inc. v. NLRB*, 965 F.2d 116 (6th Cir. 1992); *NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345 (7th Cir. 1986); *NLRB v. Best Prods. Co., Inc.*, 765 F.2d 903 (9th Cir. 1985);

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voted in this time and another petition was filed a "year and a day" later, the employees would be forced to pay a $100.00 initiation fee.

These statements are susceptible to several rational interpretations. Employees could have deciphered the business agent's comments to mean that the initiation fees were waived only if the Union won the November 1991 election, but that they would have to pay such fees in any subsequent drive. Other employees may have interpreted the remarks to mean that if the employees did not continue to show support for the Union, the Union would be forced to withdraw and the employees would be forced to pay initiation fees if the Union filed another petition a "year and a day" later. Yet another reasonable interpretation is that the employees would not have to pay initiation fees if they individually voted for or supported the Union in the November 1991 election.

These interpretations, all of which are reasonable and plausible, confirm the presence of ambiguity necessary to set aside the election. Unquestionably "[t]here was sufficient confusion in the present case regarding the waiver of initiation fees to interfere with the employees' free choice." *NLRB v. Johnson & Hardin Co.*, 554 F.2d 275, 276 (6th Cir. 1977). At a minimum, the ambiguity in the Union agent's offer requires a remand to the Board for an evidentiary hearing. *See NLRB v. Stone & Thomas*, 502 F.2d 957 (4th Cir. 1974).

Methodist Home v. NLRB, 596 F.2d 1173 (4th Cir. 1979). The Board and courts have long held that an objector is entitled to an evidentiary hearing where it presents specific evidence of specific events from or about specific people. *Swing Staging, Inc. v. NLRB*, 994 F.2d 859 (D.C. Cir. 1993); *Anchor Inns, Inc. v. NLRB*, 644 F.2d 292 (3d Cir. 1981); *NLRB v. Claxton Mfg.*, 613 F.2d 1360 (5th Cir. 1980); *Erie Coke & Chem. Co.*, 261 N.L.R.B. 25 (1982).

Despite these fundamental, well-established maxims, the Fourth Circuit and the Board chose to ignore them in denying VSA an evidentiary hearing. VSA fulfilled its evidentiary burden by submitting affidavits of three employees which stated that the Union business agent announced during preelection meetings that initiation fees would be waived if the Union was voted in. These same affidavits indicate the business agent stated the approximately $100.00 initiation fee would not be waived if the Union was defeated in the November 1991 election and the employees subsequently sought Union representation.

It is abundantly clear that VSA proffered sufficient specific evidence about specific events from and about specific people to require the granting of an evidentiary hearing. Consequently, VSA requests the Court to grant its petition for writ of certiorari thereby allowing proper review of the Fourth Circuit's and Board's unreasonable holdings.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

VSA, Inc., d/b/a VSA Carolinas,
Petitioner,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*	)	No. 93-1677
v.	)	
VSA, INCORPORATED, d/b/a Carolinas, *Respondent.*	)	

On Application for Enforcement of An Order of the National Labor Relations Board. (11-CA-15150)

Argued: February 7, 1994

Decided: May 12, 1994

Before MURNAGHAN and NIEMEYER, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Enforcement granted by published opinion. Judge Ellis wrote the majority opinion, in which Judge Murnaghan joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: Christopher Warren Young, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Petitioner. Mark E. McQueen, BERENS & TATE, P.C., Omaha, Nebraska, for Respondent. **ON BRIEF:** Jerry M. Hunter,

General Counsel, Yvonne T. Dixon, Acting Deputy General Counsel, Nicholas E. Karatinos, Acting Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Charles Donnelly, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Petitioner.

OPINION

ELLIS, District Judge:

The principal question presented in this appeal is whether a union's promise to waive initiation fees for everyone, if elected, impermissibly taints the union's subsequent election. Because we conclude that it does not, and because we conclude that the Regional Director and National Labor Relations Board ("the Board") did not abuse their discretion with regard to other employer objections to the election, we grant enforcement of the Board's Order requiring VSA to recognize and bargain with the Union.

I.

VSA, Inc. ("VSA"), a Greensboro, N.C. based company, distributes food products to retail vendors. In October 1991, the Chauffeurs, Teamsters and Helpers Union, Local No. 391 ("Union"), filed a petition with the Board, seeking certification as the representative for all drivers employed in the transportation division of VSA's Greensboro facility.[1] Pursuant to a stipulated election agreement, the Board conducted a secret-ballot election on

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[1] The challenged unit consists only of the drivers employed in VSA's Greensboro transportation division; it excludes the division's clerical employees, guards, and supervisors.

November 22, 1991, with the Union prevailing by a vote of 11 to 8.

Thereafter VSA, believing that the election was tainted, filed timely objections with the Board's Regional Director. Specifically, VSA alleged that Union representatives had conditioned a waiver of Union initiation fees upon a showing of pre-election support for the Union, thereby improperly inducing employees to vote for the Union. VSA further alleged that Union representatives and supporters had threatened employees, creating an atmosphere of fear which inhibited "employees' free choice when voting."[2] In VSA's view, these and other incidents had "contaminated" the election process, making impossible a free and uncoerced election.

The Regional Director conducted an independent, confidential investigation of VSA's allegations and then issued a report concluding that none of VSA's allegations were sufficient to warrant setting the election aside. The report accordingly recommended that VSA's objections be overruled. VSA filed timely objections to this report, arguing that the Regional Director erred when he "totally dismissed the affidavits of three Company witnesses who stated that the Union Business Agent told them there would be no initiation fee if the Union was elected, but there would be initiation fees if there was a second attempt to organize." VSA also took issue with the Regional Director's conclusion that VSA's allegations, even if true, did not warrant invalidating the election.

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[2] VSA made several other claims before the Regional Director that are not pursued here. *See* n.21, *infra*.

Finally, VSA argued that it had submitted evidence raising material issues of fact sufficient to warrant an evidentiary hearing.

In April 1992, the Board formally adopted the Regional Director's findings and certified the Union as the exclusive bargaining representative of employees in the designated unit at VSA. Following certification, VSA refused to bargain with the Union. As a result, the Union filed an unfair labor practice charge against VSA, which prompted the issuance of a complaint and notice of hearing alleging that VSA had violated Sections 8(a)(5) and 8(a)(1)[3] of the National Labor Relations Act ("NLRA") by refusing to bargain with the Union. VSA filed an answer admitting in part and denying in part the allegations, as well as asserting that the Board's certification of the Union had been improper.

In December 1992, the Board issued a Decision and Order, *inter alia*, concluding that VSA had violated Sections 8(a)(1) and 8(a)(5) of the NLRA through its refusal

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[3] 29 U.S.C. §§ 158 (a)(1) and (5) state, in relevant part:

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

to bargain with the Union.[4] Accordingly, the Decision and Order required VSA to cease and desist from interfering with, restraining, or coercing employees in the exercise of their statutory rights, and further required VSA to bargain with the Union, to embody any understanding or agreement reached during bargaining in a signed agreement, and to post a remedial notice. In May 1993 the Board's General Counsel filed an application for enforcement of the Board's Order. VSA contested the application on the grounds that the Board's decision (1) ignored "critical evidence," (2) incorrectly resolved material issues and (3) contravened settled precedent. The Board rejected these contentions, and now seeks judicial enforcement of its Order.

II.

The standards for judicial review of Board-certified elections are well-settled. To begin with, the results of a Board-supervised representation election are presumptively valid. *N.L.R.B. v. Columbia Cable T.V. Co.*, 856 F.2d 636, 638 (4th Cir. 1988). This is not an insubstantial presumption; it can be overcome only by presentation of "specific evidence not only that the alleged acts of interference occurred but also that such acts sufficiently inhibited the free choice of employees as to affect materially

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[4] The Board's Decision and Order further indicated that all of the issues raised by VSA could have been litigated in earlier representation proceedings, and concluded that VSA had failed to introduce either newly discovered or previously unavailable information that would warrant a reexamination of the Union's certification.

the results of the election." *Id.* at 638, quoting *N.L.R.B. v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir. 1987). And the burden is on VSA, as the objecting party, to show that the challenged activity prejudiced the outcome of the election. *See N.L.R.B. v. Manufacturer's Packaging Company, Inc.*, 645 F.2d 223, 225 (4th Cir. 1981); *N.L.R.B. v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967); *see also N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123, 124 (1961). Significantly, if the Board's certification decision is reasonable and based on substantial evidence in the record as a whole, then our inquiry is at an end. *Hydrotherm*, 824 F.2d at 334, quoting, *N.L.R.B. v. Klingler Electric Corp.*, 656 F.2d 76, 85 (5th Cir. 1981); *see also Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951). Given this rigorous standard, courts appropriately proceed with "judicial caution" before overturning a representation election. *See, e.g., Columbia Cable T.V.*, 856 F.2d at 639; *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (The Board enjoys "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees"). Accordingly, we review the Board's certification Order under an abuse of discretion standard. *See Hydrotherm*, 824 F.2d at 334; *Manufacturer's Packaging Co.*, 645 F.2d at 226 (The Board's determination regarding the validity of an election "is within the sound discretion of the Board" and "should be reversed only when [the Board] has abused its discretion").

III.

VSA's primary objection to enforcement of the Board's Order is that the Regional Director erroneously concluded that statements made during the election campaign concerning a waiver of Union initiation fees did not warrant vacating the election. To support its allegations, VSA submitted affidavits from three VSA employees indicating that R.W. Brown, a Union Business Agent, told employees at several pre-election meetings that initiation fees would be waived if the Union won election as the employees' representative at the November 22, 1991 election, but that if the Union did not win the election and another petition for representation was filed a "year and a day" later, everyone would be charged initiation fees.[5]

These facts, VSA argues, are analogous to those in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), where the Supreme Court held that a waiver of initiation fees conditioned upon the signing of union authorization cards prior to a representation election is improper and will result in the setting aside of a union victory. *Savair*, 414 U.S. at 276-81.[6] It follows, according to VSA, that *Savair* compels the conclusion that the election here in issue should be set aside. This argument, while superficially appealing, ultimately fails because *Savair*, closely

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[5] Brown allegedly made these statements after learning that support for the Union was waning.

[6] *See Hydrotherm*, 824 F.2d at 336; *Cataract, Inc.*, 274 NLRB 741 (1985) (Statements linking the availability of a reduced initiation fee and joining the union before the election are an impermissible inducement to employees and warrant setting aside an election).

examined, is factually distinguishable from this case in a way that points persuasively in this case to upholding, rather than setting aside, the election.

In *Savair*, "recognition slips" were circulated among employees prior to the representation election. *Savair*, 414 U.S. at 272. Any employee who signed a slip prior to the election automatically became a member of the union, and did not have to pay an "initiation fee" or "fine." *Id.* at 272-73. If an employee did not sign a slip and the union subsequently won the election, the employee would have to pay an initiation fee. *Id.* at 273. While union officials did not conduct the solicitation of "recognition" slips, the officials did explain to employees that initiation fees would be waived only for those employees who signed the slips prior to the election. *Id.* at 274. Finally, at least one employee testified that he signed a "recognition slip" specifically to avoid a "fine" if the union won the election. *Id.* at 275. On these facts the Supreme Court concluded that "[b]y permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." *Savair*, 414 U.S. at 277. Thus, the linchpin of *Savair* is the linkage between the offer to waive the initiation fee and a pre-election commitment to support the union. *See Savair*, 414 U.S. at 275-78. It is this linkage that constitutes the union's impermissible interference in the election, and allows the union "to buy endorsements and paint a false portrait" of employee sentiment. *Id.* at 277.

To the same effect is *Deming Div., Crane Co.*, 225 NLRB 657 (1976), also relied on by VSA. In *Deming*, the union mailed a two page document to all employees in

the potential bargaining unit indicating that "[T]here will be no initiation fees for anyone joining now during this campaign. . . . Sign the card! Do it now! Let's get rolling." *Deming*, 225 NLRB at 659. *Deming* is *Savair's* factual twin: in both, the initiation fee waiver was open only to those employees who signed union support cards prior to the election.[7] Thus, in *Deming*, as in *Savair*, the waiver offer was an impermissible interference in the election because, in order to benefit from the waiver, employees had to pledge pre-election union support.[8]

No such impermissible interference by the union occurred here. Unlike *Savair* and *Deming*, the offer to

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[7] *See Molded Acoustical Products, Inc., v. N.L.R.B.*, 815 F.2d 934, 938-39 and n.4 (3rd. Cir.), *cert. denied*, 484 U.S. 925 (1987) (emphasizing that *Deming*, like *Savair*, was based on a pre-election union announcement that conditioned a waiver of initiation fees on a showing of pre-election union support); *see also Coleman Company, Inc.*, 212 NLRB 927, 927-28 (1974) (holding that a waiver of initiation fees was objectionable where the union had indicated that "[t]he initiation fee will be waived for all present employees who make application for charter membership in your new local union," as such language could be interpreted by employees to indicate that "it would be to their benefit *to make a union commitment before the election*, and thereby come in at the ground floor") (emphasis added).

[8] The Board in *Deming* emphasized that:

> It is clear that the Petitioner was attempting to enlist employee endorsement for its organizational efforts urging the signing of union authorization cards for the Petitioner. One of the inducements offered to employees for obtaining their signatures prior to the election was the waiver of initiation fees. To benefit from such a waiver, employees were required to join "now during this campaign."

Deming, 225 NLRB at 659.

waive initiation fees here was not conditioned on a pre-election commitment to support or vote for the Union. On the contrary, everyone qualified for the waiver if the Union won the election, even those who opposed the Union. Similarly, in the event that the Union initially lost the election, everyone would be subject to initiation fees if the Union won a subsequent election, even those who supported the Union.[9]

VSA also misconstrues *Deming* and *Savair* as condemning any initiation fee waiver linked to the outcome of a particular election. Specifically, VSA contends that the waiver offer "applied only to this campaign," and was "directly related to a favorable vote in the election." This is true; the fee waiver in issue was directly related to a Union victory.[10] But this is not what *Savair* and *Deming* forbid: what is forbidden in *Savair* and *Deming* is a linkage between the waiver of initiation fees and, as did not occur here, pre-election commitment by employees to vote for the Union. Similarly, *Savair* and *Deming* also forbid linking a fee waiver for a particular employee to that employee's individual vote. Thus, a waiver offer

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[9] Unless of course, the Union made the same offer in a subsequent election, in which case everyone would again qualify for the waiver.

[10] By definition, an offer to waive initiation fees is related to a particular outcome or general "vote" in a representation campaign, namely a union victory. *See Molded Acoustical Products*, 815 F.2d at 937-39 (holding that a union's pre-election letter to employees indicating that employees would not have to pay initiation fees if they voted for the union could only be logically interpreted as an offer to waive initiation fees if the union were elected, rather than an offer to waive fees only for those who voted for the union).

made to employees voting in favor of a union and not to those voting against the union is impermissibly related to an employee's "yes or no" vote. *See Molded Acoustical Products, Inc.*, 815 F.2d at 938-39.[11] Here, the Board found no evidence that the waiver offer was limited to those employees who voted for the Union. Rather, as the Board concluded, the Union made an across-the-board waiver offer that applied equally to all employees, regardless of how they actually voted or whether they made a pre-election commitment to support the Union. As such, the Union's waiver offer is a permissible campaign tactic that does not run afoul of *Savair* and *Deming*.

Indeed, as *Savair* and *Deming* make clear, not every union offer to waive initiation fees is impermissible. Thus *Savair* indicates, in dicta, that union interests may be legitimately served by offering an across-the-board waiver to all employees, regardless of whether employees show pre-election union support. *Savair*, 414 U.S. at 272-74.[12] The Board in *Deming* went further and noted

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[11] Indeed, in *Molded Acoustical Products*, the Third Circuit noted that it would be difficult, if not impossible, for a union to base a waiver of initiation fees on how a particular employee voted "[b]ecause the ballots in an election are kept secret even after the vote is tallied." *Molded Acoustical Products*, 815 F.2d at 938-39. *See, e.g., A.J. Tower Co.*, 329 U.S. 324, 330-32 (1946) (emphasizing that an employer's challenges to employee votes for the purpose of ascertaining how a particular employee voted in a representation election are sharply limited).

[12] *See N.L.R.B. v. Stone & Thomas*, 502 F.2d 957, 958 (4th Cir. 1974) (remanding case to Board to determine whether an ambiguous union offer to reduce initiation fees was impermissibly selective and thus violative of *Savair*).

that unions may permissibly offer to waive initiation fees in the course of an election provided:

(1) the waiver is unconnected with support for the union before the election

(2) the waiver is unrelated to a vote in the election

(3) the waiver is made without distinction between joining the union before or after the election.

Deming Div., 225 NLRB at 659 (citing *Savair*). Various circuits, including this circuit, have adopted this interpretation of *Savair* and have consistently held that a union does not endanger the free exercise of employee choice if it does not condition its initiation fee policy on pre-election union support, but rather offers an across-the-board fee waiver to all employees, regardless of pre-election union support. *See, e.g., N.L.R.B. v. Hydrotherm, Inc.*, 824 F.2d 332, 336 (4th Cir. 1987).[13] Thus this circuit and the Supreme Court, as well as various other circuits, have indicted that the crucial distinction in determining

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[13] *See also Colquest Energy, Inc., v. N.L.R.B.*, 965 F.2d 116, 122 (6th Cir. 1992); *Molded Acoustical Products, Inc.*, 815 F.2d at 937; *Bokum Resources Corp. v. N.L.R.B.*, 655 F.2d 1021, 1024 (10th Cir. 1981); *Vicksburg Hospital, Inc. v. N.L.R.B.*, 653 F.2d 1070, 1076 (5th Cir. 1981); *N.L.R.B. v. Spring Road Corp.*, 577 F.2d 586, 589 (9th Cir. 1978); *N.L.R.B. v. Dunkirk Motor Inn, Inc.*, 524 F.2d 663, 665 (2d Cir. 1975) (An across-the-board waiver of initiation fees is a "reasonably calculated response to the traditional management argument that the workers are being asked to support the Union before it has secured any benefits for them."); *N.L.R.B. v. Wabash Transformer Corp.*, 509 F.2d 647, 649-50 (8th Cir.), *cert. denied*, 423 U.S. 827 (1975).

whether a proposed waiver of initiation fees is a permissible union tactic is between waiver offers made across-the-board to all employees regardless of pre-election union support, and waiver offers made only to those employees who manifest pre-election union support or who voted for the Union. The former offers are permissible, the latter are not.

Yet, VSA seemingly argues that the Union's promise to waive initiation fees, even if across-the-board, had an impermissibly coercive effect. This is not so, for while any offer to waive initiation fees is an inducement, this inducement, this inducement does not amount to impermissible coercion in the absence of a linkage between the offer and either a pre-election pledge of union support or an actual vote for the union.[14] The fact is that most permissible union and management tactics are inducements designed to persuade or pressure employees to vote for one side or the other. And there is sometimes a fine line between permissible and impermissible inducements or conduct. For example, it is impermissibly coercive for rank and file employees to make intimidating statements to non-union employees as the non-union employees vote in a union representation election. *See Kitchen Fresh, Inc. v. N.L.R.B.*, 716 F.2d 351, 359 (6th Cir. 1983). At the same time, the congregation of union supporters, wearing union insignia, near polls for the purpose of urging voters to "protect their jobs with a vote for

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[14] Not [*sic*] before us is the question whether an offer to waive an exceptionally high fee, even though available to everyone, across the board, would nonetheless be an impermissible inducement given the amount of the fee.

the union," does not "interfere with the voter's exercise of free choice to such an extent that the conduct materially affected the results of the election," even though such behavior is arguably intimidating. *Colquest Energy, Inc., v. N.L.R.B.*, 965 F.2d 116, 120 (6th Cir. 1992). Further, a union is free to promise employees a benefit established for union members, such as free legal representation, provided receipt of the benefit is not conditioned on the employee's demonstration of pre-election union support. *Colquest Energy*, 965 F.2d at 121.[15] Yet, an employer may be constrained from matching the union's promise.[16] Thus the Board and reviewing courts must discern the line between assuring a fair election, and not unduly restricting the campaign actions of either unions or management.

Of course, the primary goal of the Board in regulating representation campaigns, and of courts on review, is ensuring that the election process is as fair and free from impermissible inducements as possible. Yet, while the Board "aspires to 'laboratory conditions' in elections," it is clear that "clinical asepsis is an unattainable goal in the real world of union organizational efforts." *N.L.R.B. v. Sumter Plywood Corp.*, 535 F.2d 917, 920 (5th Cir. 1976),

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[15] In *Colquest*, the Sixth Circuit noted, in terms apt here, that "[t]he key to the validity of the union's promises is that the promises be made to all employees without concern for whether or not they demonstrate support for the union during the election process." *Colquest Energy*, 965 F.2d at 121.

[16] Indeed, the Act generally prohibits an employer from offering inducements, such as a promise to raise wages or grant other benefits, during the course of a campaign. *See N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

cert. denied, 429 U.S. 1092 (1977).[17] Indeed, "exaggerations, hyperbole, and appeals to emotions are the stuff of which election campaigns are made." *Schneider Mills, Inc., v. N.L.R.B.*, 390 F.2d 375, 379 (4th Cir. 1968) (en banc). And while "[c]oercive conduct is never condoned during the election process . . . the Board will not set aside an election unless an atmosphere of fear and coercion rendered free choice impossible." *N.L.R.B. v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). To accept VSA's argument that the Union's across-the-board fee waiver offer was impermissibly coercive would be to condemn any union campaign tactic that involves any element of pressure or inducement. Settled authority is sensibly to the contrary, otherwise no election would survive scrutiny. *See Sumter Plywood*, 535 F.2d at 920 ("Some degree of puffing and propagandizing must be permitted, else the laboratory would be found infected in every case."). Rather, it is the degree of pressure or inducement that is crucial in determining whether a representation campaign is valid, or must be set aside. And in order for such pressure or inducement to warrant setting aside an election, it must lead to the "failure of those in the bargaining unit to make their collective desires effective." *Overnite Transportation Company v. N.L.R.B.*, 327 F.2d 36, 41 (4th Cir. 1963). And in the case at bar, VSA has failed to show that the Union's waiver offer

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[17] *See N.L.R.B. v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987) ("[w]hile the Board strives to maintain 'laboratory conditions' . . . in reality these conditions are often 'less-than-perfect' ").

led to the inability of those VSA employees in the designated bargaining unit to "make their collective desires effective."

IV.

But the analysis does not end with the conclusion that unconditional and across-the-board offers to waive union initiation fees are a permissible union campaign tactic. VSA does not concede that the Union's fee waiver offer here was unconditional; rather, it attacks the Regional Director's and Board's factual conclusion that the offer was in fact across-the-board and unconditional. The substantial evidence rule spikes this attack, for there is ample record evidence to support the Regional Director's and Board's conclusion.

To begin with, as the Regional Director pointed out, a leaflet mailed by the Union to VSA employees prior to the election, entitled "What You Should Know About the Teamsters Union," clearly indicated that "there would be no initiation fees without any distinction between those signing cards before or after the election."[18] The Regional Director further correctly concluded that the Union

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[18] The leaflet poses the question "[W]hat about initiation fees and dues?" The answer does not condition the waiver on pre-election support, nor does it limit the waiver to those who vote for the Union; it merely states:

> There are no initiation fees. And you start paying dues only after negotiations and after a contract has been approved and ratified by you. You start paying dues only after we have shown what we can do for you.

Agent's remarks "did not state either implicitly or explicitly that anyone would be required to pay initiation fees after the Union won the election." And the Regional Director further found, based on the statements and evidence presented by VSA, that the Union did not impermissibly indicate that the waiver offer would terminate prior to the representation election, *see Cataract, Inc.*, 274 NLRB 741 (1985); *Coleman Company*, 212 NLRB at 227-28, but merely indicated that the offer would not apply to any future election.[19] VSA, in short, did not show that the Union's pre-election waiver offer operated to prevent employees from making their collective desires known. *See Columbia Cable TV*, 856 F.2d at 638, quoting *Hydrotherm*, 824 F.2d at 334.

VSA contends that the leaflet language, as well as the statements made by Union Agent Brown, were ambiguous, such that the language and statements might reasonably have been construed by VSA employees to mean that the waiver offer was conditioned on either a showing of pre-election Union support or an actual vote for the Union. It is true that ambiguous waiver offers are to be

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[19] Affidavits submitted by VSA support this conclusion, as they indicate that Union Agent Brown (1) announced that he would waive the Union's initiation fees for all employees who were participating in the election and (2) announced at another pre-election meeting that the Union would waive initiation fees only if the Union was elected as the employees' representative on November 22, 1991, but not if the Union was defeated at the election and employees subsequently sought Teamster recognition in any future election. None of the affidavits suggest that the waiver offer either was conditioned on a showing of pre-election Union support, or was limited to those employees who voted for the Union.

interpreted against the offeror. *See N.L.R.B. v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 889 (2d Cir. 1983) ("[W]aiver offers, the language of which is ambiguous concerning "critical details" – in particular the date until which the offer remains open – violate *Savair*, notwithstanding how employees may actually construe those offers."). Yet, substantial evidence in the record as a whole supports the conclusion of the Regional Director and the Board that the Union's offer was not ambiguous, but clearly indicated that there was no linkage between a showing of pre-election Union support and a waiver of initiation fees. Accordingly, the Board did not abuse its discretion in concluding that the Union's fee waiver offer did not warrant invalidating the election.

V.

VSA next argues that it was entitled to an evidentiary hearing before the Board certified the representation election. Pre-certification evidentiary hearings are necessary only if there are substantial and material issues of fact relating to the validity of the election. *Columbia Cable TV Co.*, 856 F.2d at 639; *see N.L.R.B. v. Hydrotherm*, 824 F.2d 332, 335 (4th Cir. 1987); *N.L.R.B. v. Bata Shoe Co.*, 377 F.2d 821, 825 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967). Yet, an employer is not required to present evidence that presumptively establishes that its objections must be sustained before it can obtain an evidentiary hearing. *N.L.R.B. v. J-Wood/A Tappan Div.*, 720 F.2d 309, 315 (3rd

Cir. 1983).[20] And significantly, the allegations of the objecting party must be taken as true in determining whether or not "substantial and material factual issues" exist. *Anchor Inns, Inc., v. N.L.R.B.*, 644 F.2d 292, 297 (3rd Cir. 1981). "Once the right to a hearing is established, the investigation is not a substitute for it." *Anchor Inns*, 644 F.2d at 297, quoting *N.L.R.B. v. Claxton Mfg. Co.*, 613 F.2d 1364, 1366 (5th Cir. 1980), *modified* 618 F.2d 396 (5th Cir. 1980). These principles, applied here, confirm that the Regional Director and Board correctly determined that no pre-certification evidentiary hearing was required.

VSA contends there were several genuine issues of material fact, including the waiver of initiation fees, that mandated the holding of an evidentiary hearing. Ultimately, VSA's objections regarding the evidentiary hearing fail. VSA submitted, and the Regional Director properly accepted as true, affidavits from VSA employees stating that Union Agent Brown made a pre-election offer to waive initiation fees. *See, e.g., N.L.R.B. v. Manufacturer's Packaging*, 645 F.2d 223, 226 n.1 (4th Cir. 1981), quoting

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[20] The Third Circuit further noted that "[t]he whole purpose for the hearing is to inquire into the allegations to determine whether they are meritorious; it makes little sense to expect the employer to prove its case, especially without the power of subpoena, to the Regional Director before a hearing will be granted. *J-Wood*, 720 F.2d at 315. Yet, while it may not be reasonable to expect an employer such as VSA to document its objections "with the kind of evidence that realistically could be uncovered only by the subpoena and an adversarial hearing," *J-Wood*, 720 F.2d at 316, it does not follow that an evidentiary hearing is required where, as here, the employer's evidence is insufficient to raise material issues of fact regarding an election's validity.

Bata Shoe, 377 F.2d at 826 (An evidentiary hearing is not required when, "if all the facts supporting the position of the objecting party were credited, no ground is shown for setting aside the election."). Only after considering the evidence submitted by both VSA and the Union did the Regional Director conclude that the evidence proffered by VSA did not warrant either invalidating the election or granting VSA an evidentiary hearing.[21] And VSA, as the

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[21] VSA raised several additional issues before the Regional Director that are not pursued here. First, VSA contended that the Union "threatened" employees in an attempt to "buy" endorsements, as Union Agent Brown allegedly told employees that, by signing a Union card, employees would have the "protection" of the Union if the Company took action against the employees for attending organizational meetings. The Regional Director concluded that these remarks were "nothing more than a statement of support for employees who are active union supporters," and were thus encompassed by Section 8(c) of the Act. A second claim that VSA initially made before the Regional Director was that Union representatives and/or supporters physically struck a management official in the face with a wooden board.

Finally, VSA argued that "Union representatives, agents and adherents" threatened employees and created an atmosphere of fear which inhibited employees' free choice when voting. Specifically, VSA pointed to a conversation between several employees in which one employee allegedly stated that during a previous organizing campaign, in which the employee favored union representation, he used a rifle to shoot holes in company-owned tractor-trailers. Further inquiry revealed that the statements were made during a conversation between a small number of individuals and therefore could reasonably have been found not to create a general atmosphere of "fear and intimidation" among employees, the statements were made after election ballots had been cast, the employee making the statements was neither an agent of the Union nor acting on the Union's behalf, the statements referred to an earlier election

objecting party, failed to offer any other evidence "which prima facie would warrant setting aside the election." *Bata Shoe*, 377 F.2d at 825; *see ARA Services, Inc., v. N.L.R.B.*, 712 F.2d 936, 937 (4th Cir. 1983). Accordingly, the Board's determination that the fee waiver at issue here did not impermissibly coerce employees into supporting the Union was not unreasonable, was supported by the substantial record evidence, and therefore was not an abuse of discretion.[22]

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campaign, and the alleged incidents discussed were not connected to any representation campaign, but were rather part of a personal dispute. *See Herbert Halperin Distributing*, 928 F.2d at 292 (The mere fact that an employee may have made "forceful" and "somewhat threatening" statements that were "hardly commendable" does not, in itself, constitute "the sort of conduct that would require an election to be set aside."). Accordingly, the Regional Director and Board did not abuse their discretion in concluding that the alleged statements did not warrant setting the election aside.

[22] The instant election was close: a swing of only two (2) votes would have changed the outcome. VSA implies that the closeness of the election was another issue that warranted the granting of an evidentiary hearing. To be sure, *Savair* indicates that the closeness of an election counsels in favor of closer scrutiny of objections. *Savair*, 414 U.S. at 278 (closely reviewing allegedly impermissible union waiver offer where "the change of just one vote would have resulted in a 21-21 election rather than a 22-20 election" in which the union prevailed); *see St. Margaret Memorial Hosp. v. N.L.R.B.*, 991 F.2d 1146, 1156 (3rd Cir. 1993) (indicating that a "closer scrutiny" of any objection to an election is required where "a swing of two votes would have changed the result"); *United Steel Workers of America, AFL-CIO v. N.L.R.B.*, 496 F.2d 1342, 1347 n.11 (5th Cir. 1974) ("If the margin of victory in a representational campaign is very narrow, minor violations should be more closely scrutinized."). But even close scrutiny here discloses no abuse of discretion by the Board in

Essentially, then, VSA takes issue not with the legal principles applied by the Regional Director and the Board, but merely with the factual conclusions reached. We have repeatedly emphasized that a party's disagreement with the interpretation or inferences placed on facts by the Regional Director is simply not sufficient to warrant an evidentiary hearing. *Methodist Home v. N.L.R.B.*, 596 F.2d 1173, 1178 (4th Cir. 1979); *see also Intertype Co. v. N.L.R.B.*, 401 F.2d 41, 44 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969). ("[T]o insist that the Board conduct a plenary hearing for every objection raised during representation proceedings would, by encouraging dissatisfied parties to engage in this dilatory tactic, prevent the prompt disposition of election cases.") In sum, the Board did not abuse its discretion in determining that the Union's offer to waive initiation fees was not impermissible under the *Savair* principle, that the evidence presented by VSA did not warrant setting aside the election, and accordingly that an evidentiary hearing was not required.

The Board's Order will be enforced.

ENFORCEMENT GRANTED

NIEMEYER, Circuit Judge, dissenting:

During the course of an election campaign, representatives of the Chauffeurs, Teamsters and Helpers Union, Local No. 391 ("the Union") told employees of VSA, Inc., at several pre-election meetings, that Union initiation

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concluding that the Union's waiver offer did not violate *Savair*, and in not granting VSA an evidentiary hearing.

fees, of $100, would be waived if the Union won the election, but that if the Union lost the election, the fees would not be waived for a future campaign. The details, established by employee affidavits, are not substantially in dispute:

> That after discovering that support for the Union was decreasing, R. W. Brown announced, at a Union meeting attended by other drivers, that the Union would waive initiation fees only if it was elected as the employees' representative on November 22, 1991. Brown further stated that the initiation fees would not be waived if the Union was defeated in the November 22 election and the employees subsequently attempted to gain Teamster representation in any future election.

The Union won the election by a vote of 11 to 8.

VSA objected to the representation election, contending that "union representatives conditioned a waiver of initiation fees upon a showing of pre-election support for the Union, thereby improperly inducing employees to vote for the Union." The Regional Director refused to set aside the election and the National Labor Relations Board ("the Board") affirmed and certified the Union as the bargaining representative. Because I believe that the Union's offer to waive the fees was an effort to purchase the employees' vote, since the offer was conditioned on a vote in favor of the Union, I conclude that the practice interfered with the principle of neutrality imposed by § 7 of the National Labor Relations Act, 29 U.S.C. § 157. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). Accordingly, I would deny enforcement of the Board's order

requiring negotiation pursuant to this representation election.

In *Savair,* the union offered to waive union membership initiation fees for employees who signed "recognition slips" before the representation election. While the waiver was not in any way directly tied to how the employee would vote, the Supreme Court nevertheless found the practice to interfere with the free choice of employees in the election. The Court reasoned that signed recognition slips could be used as a campaign tool by the union to solicit other votes, and thus violate the policy of assuring a fair and free choice during elections. Moreover, even though the Court recognized that signing a recognition slip did not obligate the employee to vote in a particular manner at the election, it nevertheless condemned the practice on the possibility that an employee who did sign such a recognition slip might feel obliged to carry through and vote for the union. To approve the union practice would, the Court concluded, violate the fair election policy which must "honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." 414 U.S. at 278. Because the benefit offered to the employees in this case, even though offered to all, is conditioned on a union victory, it also has the effect of urging a vote for the union and therefore cannot be neutral. An election following such an offer cannot be "fair" as defined by *Savair* and must be set aside.

The *Savair* holding was applied later by the Board in *Deming Division, Crane Co.,* 225 NLRB 657 (1976), where the union had agreed during an election campaign to waive initiation fees for any employee who signed an

"authorization card." Concluding that the practice violated the instruction of *Savair*, the Board set aside the election, stating a principle that is directly relevant to this case:

> [A] waiver is permissible only where it is unconnected with support for the union before the election, unrelated to a vote in the election, and with support for the union before the election, unrelated to a vote in the election, and without distinction between joining the union before or after the election.

225 NLRB at 659.

While the benefit created by a waiver of initiation fees in the case before us is not linked to individual support, it is nevertheless linked to a successful vote for the Union with the threat that in the next election campaign, there will be no such waiver. The waiver of initiation fees was thus conditioned on a particular vote, that being one for the Union, and it clearly supplied an inducement to vote in a particular way. Thus, even though the offer was extended to all employees, its benefits could not have been realized unless the Union won and a person in doubt about how to vote might thus be influenced to vote for the Union.

A policy that sanctions this practice, I submit, is not neutral because it tends to favor the organizing effort. Stated in the prohibition established by *Deming*, the benefit is *related to the vote* in an election. This is not the same as the practice of offering an across-the-board waiver of initiation fees to all employees joining the Union, *regardless of the outcome of the vote.*

Because enforcement of the Board's order would perpetuate a nonneutral policy, I would deny enforcement of the Board's order and remand the case with directions to order a new election. I therefore respectfully dissent.

NOT INCLUDED IN
BOUND VOLUMES

SDR

Greensboro, NC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VSA, INC., d/b/a VSA CAROLINAS

Employer

and

Case 11-RC-5808

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 391, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on November 22, 1991, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 8 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations,[1] and finds that a certification of representative should be issued.

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[1] The Employer excepts, inter alia, to the Regional Director's failure to hold a hearing on its objections. We have reviewed all of the Employer's evidence, and, having accepted

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters Local No. 391, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All drivers employed in the transportation division of VSA, Inc., d/b/a/ VSA Carolinas, at its Greensboro, North Carolina facility; excluding office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., April 20, 1992.

James M. Stephens, Chairman

Dennis M. Devaney Member

John N. Raudabaugh, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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as true the facts most favorable to the Employer, we find that the Employer has failed to meet its burden of presenting a *prima facie* case of objectionable election interference. Since none of the Employer's objections raises substantial or material factual issues, no evidentiary hearing is warranted. See Sec. 102.69(d); *National Duct Corporation*, 265 NLRB 413 fn. 2 (1982); *NLRB v. Lovejoy Industries, Inc.*, 904 F.2d 397 (7th Cir. 1990).

In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation to overrule the Employer's Objections (b) and (c).

SDO

309 NLRB No. 188

D-3388
Greensboro, NC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VSA, INC., d/b/a VSA CAROLINAS

and

Case 11-CA-15150

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL UNION NO. 391

DECISION AND ORDER

On October 7, 1992, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 11-RC-5808. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On November 20, 1992, the General Counsel filed a Motion for Summary Judgment and memorandum in support, with exhibits attached. On November 24, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 27, 1992, the

Respondent filed an opposition to Motion for Summary Judgment with exhibits attached.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a Colorado corporation with a facility located at Greensboro, North Carolina, where it is engaged in distributing food products to vendors. During

the 12 months preceding issuance of the complaint, which period is representative of all times material here, the Respondent received at its Greensboro, North Carolina facility goods and raw materials valued in excess of $50,000 directly from points outside the State of North Carolina and during the same period of time, shipped products valued in excess of $50,000 directly to points outside the State of North Carolina.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held November 22, 1992 [*sic*], the Union was certified on April 20, 1992, as the collective-bargaining representative of the employees in the following appropriate unit:

> All drivers employed in the transportation division of Respondent, at its Greensboro, North Carolina facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about July 15, 1992, the Union has requested the Respondent to bargain and, since about July 15, 1992,

the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By refusing on and after July 15, 1992, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, VSA, Inc., d/b/a VSA Carolinas, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Chauffeurs, Teamsters and Helpers Local Union No. 391, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All drivers employed in the transportation division of Respondent, at its Greensboro, North Carolina facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Greensboro, North Carolina, copies of the attached notice marked "Appendix."[1]

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[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading

Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 1992

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Chauffeurs, Teamsters and Helpers Local Union No. 391 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All drivers employed in the transportation division at our Greensboro, North Carolina facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

VSA, INC., d/b/a
VSA CAROLINAS
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101-3986, Telephone 919-631-3212.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 7, 1994

No. 93-1677
11-CA-15150

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

VSA, INCORPORATED, d/b/a Carolinas
Respondent

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Respondent's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK